

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 THOMAS JOE MILLER-EL, :
4 Petitioner :
5 v. : No. 03-9659
6 DOUG DRETKE, DIRECTOR, TEXAS :
7 DEPARTMENT OF CRIMINAL :
8 JUSTICE, CORRECTIONAL :
9 INSTITUTIONS DIVISION. :
10 - - - - -X
11 Washington, D.C.
12 Monday, December 6, 2004
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:58 a.m.
16 APPEARANCES:
17 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the
18 Petitioner.
19 GENA BUNN, ESQ., Assistant Attorney General, Austin,
20 Texas; on behalf of the Respondent.
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P R O C E E D I N G S

(10:58 a.m.)

JUSTICE STEVENS: We'll hear argument now in the case of Miller-El against Dretke.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN
ON BEHALF OF THE PETITIONER

MR. WAXMAN: Justice Stevens, and may it please the Court:

In Hernandez v. New York, this Court explained that there are exceptional cases in which the totality of evidence surrounding jury selection is so strong that a finding of no discrimination is simply too incredible to be accepted by this Court. This is that exceptional case, a case in which even on collateral review, the sheer weight of the mutually reinforcing evidence renders objectively unreasonable the State court's conclusion that race did not motivate even one of the prosecution's peremptory strikes.

JUSTICE O'CONNOR: Do we have to find that the strike of at least one African American prospective juror was race-based for you to prevail?

MR. WAXMAN: I believe so. You have to find, Justice O'Connor, that race was the but-for factor or the tipping factor, not the only factor, but the but-for

1 factor for at least one to come within the four corners of
2 Batson.

3 Now, I could argue I think, if I needed to in
4 this case, that the jury shuffle evidence alone, which is
5 an unexplained, blatantly race-based means of racially
6 excluding jurors from the venire, comes within Batson, the
7 Batson proscription itself, or I could argue that case
8 too.

9 JUSTICE KENNEDY: Were there any -- were there
10 any State decisions, or Federal court decisions for that
11 matter, justifying the shuffle on the grounds of -- I
12 don't know -- professional class versus working class or
13 something like that?

14 MR. WAXMAN: The State has in its brief in this
15 case, on this trip to the Court -- the State has cited the
16 Court to one other case in which the Court of Criminal
17 Appeals acknowledged the State's justification in that
18 case, that it shuffled because there was a member of the
19 probation office in the front row that they didn't want to
20 embarrass and that jurors in the front had tended more to
21 have ties than jurors in the back. That is -- that was
22 never claimed in this case. We have, from the very --

23 JUSTICE KENNEDY: Were there -- were there any
24 State court cases said that -- or even in that case you're
25 referring to -- that the shuffle usually is race-based?

1 MR. WAXMAN: You know, I can't -- the case is
2 called Ladd v. State. There is -- there's some -- now
3 some reasonably substantial Law Review commentary in the
4 State of Texas. I cited the Court to -- to one in the
5 Houston Law Review or the Houston Bar Review when I was
6 here last time, and there has since been one in the St.
7 Mary's Law Review that says this is a procedure that is
8 used to discriminate on the basis of visual preference.

9 And what's particularly interesting about it in
10 this case is there was a contemporaneous objection in week
11 2 and week 3 and week 4 that the State was doing this
12 based on race, and the State offered no defense at the
13 time. It offered no defense in the subsequent Batson
14 hearing. It had no explanation before the magistrate, the
15 district judge, the Fifth Circuit, in this Court or below,
16 and now in this Court this time it says, well, there's
17 this other case in which the reason given was that we
18 didn't want to embarrass the probation officer and we
19 didn't -- and we had people who had ties in the front row.
20 There is no evidence whatsoever in the record that would
21 justify those excuses here.

22 And the evidence in the -- the only evidence in
23 the record that seems to me compels the conclusion that
24 this was done for the deliberate purpose of minimizing the
25 number of African Americans on the jury. And it was done

1 by prosecutors, each of whom -- there were two prosecutors
2 in this case, each of whom was found to have violated
3 Batson in criminal -- other criminal trials
4 contemporaneous with this one. And --

5 JUSTICE GINSBURG: And the -- and the Fifth
6 Circuit's answer to the jury shuffle was, well, the
7 defense shuffled more times, as I --

8 MR. WAXMAN: The Fifth --

9 JUSTICE GINSBURG: -- as I recall.

10 MR. WAXMAN: The -- the Fifth Circuit said that
11 we -- that they shuffled twice and we shuffled five times.
12 Now, that is both factually wrong and legally irrelevant.
13 They shuffled three times and they tried to shuffle a four
14 times -- a fourth time because, the Court will perhaps
15 recall -- this was discussed in the Court's last opinion
16 -- because they waived in the fourth week. The defense
17 shuffled -- the defense then shuffled and they tried to
18 come in and back -- back and shuffle again when a number
19 of African Americans were advanced in the order.

20 There -- under this Court's Batson
21 jurisprudence, the proscription against using peremptory
22 strikes for a racial purpose or a gender-based purpose is
23 proscribed to the defense, as well as the prosecution, but
24 there -- the one doesn't excuse the other, and there has
25 never been a claim, nor is there a factual predicate laid

1 in this case for a claim, that Mr. Miller-El's trial
2 lawyers were doing the same. Even if it were true, it
3 would not justify what they did.

4 Now --

5 JUSTICE KENNEDY: If -- if we find or if there
6 is a finding that the -- that the attempted shuffle on
7 this fifth try was race-based, does that win your case,
8 even though the shuffle didn't take place?

9 MR. WAXMAN: Well, it was the --

10 JUSTICE KENNEDY: I mean, does it show the
11 necessary animus so that it carries through the whole
12 case?

13 MR. WAXMAN: I think, if I needed to -- I mean,
14 we -- we've argued that the shuffle, just like the race
15 coding of the cards in the pre-Batson era, the disparate
16 questioning on minimum punishment and the graphic script,
17 all reinforce what we think the record shows with respect
18 to each of the six peremptory strikes that we challenge

19 But if we didn't have that, Justice Kennedy, I
20 would be here arguing that if I could show a single strike
21 that was made for the purpose of eliminating African
22 Americans from being considered for jury service, that
23 that ought to come within this Court's proscription of
24 Batson. Now, we haven't made that freestanding claim
25 because I don't think we need that freestanding claim.

1 The jury shuffle is a practice that exists only
2 in the State of Texas and, to my understanding, has ever
3 existed only in the State of Texas. So it's a -- it's a
4 very peculiar phenomenon, but I think I could make the
5 argument that, look, even if there weren't any of these
6 six -- let's say they shuffled it so successfully that no
7 African Americans came up. There simply were no African
8 Americans out of the 108 who were questioned. It seems to
9 me that that in and of itself would violate at least a
10 generous reading of Batson.

11 JUSTICE SCALIA: Mr. Waxman, we really have to
12 examine your -- you know, your allegations, I suppose, one
13 at a time. It makes it a very complicated case.

14 The -- the State's response to -- to your
15 argument that two of -- of the State's attorneys involved
16 in this case had been found to have made racially based
17 strikes in the past -- the State's response to that is
18 that that was not part of the evidence presented in State
19 court, and therefore, it -- it is not a proper
20 consideration in reviewing the State court decision. What
21 -- what is your response to that?

22 MR. WAXMAN: I think that's wrong. I think it's
23 wrong, first of all, because those two cases had been
24 decided by the Court of Criminal Appeals at the time it
25 considered the Batson claim in this case.

1 JUSTICE SCALIA: Was it brought to the attention
2 of the court?

3 MR. WAXMAN: I -- I am not sure. I don't have
4 the -- neither the transcript nor the briefs are available
5 for that argument. But it's -- the court -- they are
6 judicial decisions of that court. The Court can take
7 judicial notice of them and they are evidence.

8 JUSTICE SCALIA: Oh, my. You mean anything out
9 there that -- that a court could take judicial notice of
10 can be -- can be charged to the court? My goodness, no.
11 I think it was the burden of the -- of the defendant
12 challenging the -- the strikes to bring -- bring that to
13 the attention of the court. My goodness.

14 MR. WAXMAN: Even -- I understand your argument.
15 I can't tell you for sure -- and I don't believe anybody
16 can -- whether those cases were or weren't argued before
17 the Texas Court of Criminal Appeals because my
18 understanding is -- I don't -- I have not seen the briefs
19 that were filed in the Batson appeal, and I don't have the
20 transcript of the argument.

21 JUSTICE SOUTER: Were -- were both of the cases
22 cases of the Texas Court of Criminal Appeals?

23 MR. WAXMAN: Yes, yes.

24 JUSTICE SOUTER: Decided by the court -- the
25 Texas Court of Criminal Appeals.

1 MR. WAXMAN: Yes. The -- the very same court.
2 And in any event --
3 JUSTICE KENNEDY: Well, now, Nelson -- there's
4 Macaluso?
5 MR. WAXMAN: Macaluso.
6 JUSTICE KENNEDY: Macaluso and Nelson. Nelson
7 wasn't involved in the jury selection in this case, was
8 he? He came in --
9 MR. WAXMAN: He certainly was.
10 JUSTICE KENNEDY: I thought he came in after --
11 after the jury had been selected.
12 MR. WAXMAN: No. That was Mr. Kinne had the
13 chickenpox, so the jury was -- the -- the voir dire took
14 place. Mr. Macaluso and Mr. Nelson alternated the voir
15 dire examination in the case, and those were the two
16 prosecutors, Mr. Macaluso in the other Miller-El -- in the
17 Chambers case and Mr. Nelson in Mrs. Miller-El's case.
18 And interestingly, what the Texas Court of
19 Criminal Appeals said with respect to Mr. Macaluso in the
20 Chambers case is not only that he removed five out of five
21 African Americans for reasons that violate Batson, but the
22 Texas Court of Criminal Appeals also noted that he was
23 using the same minimum punishment ploy that he used in
24 this case in order to disqualify African American jurors.
25 He -- the court actually goes and says, you know, with

1 three of these people, the State tried to disqualify them
2 by asking them an open-ended question about what they
3 thought the minimum punishment should be even though
4 that's usually what the defense is concerned about.
5 Precisely what happened in this case.

6 Now, I'm not suggesting, Justice Scalia, that
7 our case depends upon the -- this 404(b) evidence or not,
8 and I think it's quite --

9 JUSTICE SCALIA: I mean, that's the problem.
10 We've got to go through each one of them one by one.

11 MR. WAXMAN: Well, I --

12 JUSTICE SCALIA: And -- and I'm -- you know, I
13 don't remember the names of people involved in -- in prior
14 cases in this Court. I -- I -- you know, if we said --

15 MR. WAXMAN: Justice --

16 JUSTICE SCALIA: -- you had this same officer
17 before you, my goodness, I -- I wouldn't remember it.

18 MR. WAXMAN: Justice Scalia, a -- first of all,
19 these -- each of these cases was tried within months of
20 Mr. Miller-El's case, and a finding by a -- the State's
21 highest court that a prosecutor has engaged in
22 intentional, deliberate, race discrimination in the
23 selection of a jury I respectfully submit -- I certainly
24 hope is not the kind of everyday finding that is easily
25 forgotten.

1 But in any event, you -- yes. You have to go
2 through all of the evidence in the case, and what the
3 evidence in the case shows is that, first of all, as this
4 Court observed the last time it was here, the State's
5 proper race-neutral rationales for striking African
6 American jurors pertains just as well to white jurors who
7 were not challenged and who did serve.

8 It's -- you also have to look at the race-coding
9 of the cards, race-coding that was done by prosecutors
10 whom this Court observed last time were trained in an
11 office culture suffused with bias against African
12 Americans in jury selection.

13 And you also have to look at, with respect, the
14 remarkable disparity in the way in which African American
15 and white venire members were questioned, both with
16 respect to minimum punishment --

17 JUSTICE STEVENS: May I --

18 MR. WAXMAN: -- and with respect to the graphic
19 script.

20 JUSTICE STEVENS: May I ask on the minimum
21 punishment ploy? Did that ever work in this case or did
22 any of -- of the trial judges ever grant a -- a challenge
23 for cause on the basis of the use of the minimum
24 punishment ploy?

25 MR. WAXMAN: Well, I can't speak to other cases.

1 But what's truly remarkable about this case -- I
2 mean, there are many things that are truly remarkable
3 about this case -- the State not only used this minimum
4 punishment ploy with 90 -- 7 out of 8 of the African
5 Americans, as opposed to only 2 out of 36 of the whites,
6 but it actually tried to remove 2 of the African Americans
7 in this case: Rand and Kennedy. It submitted them for
8 cause based on their answers to those questions. And then
9 interestingly, when that was denied and the State had to
10 justify its -- to provide its race-neutral reasons for
11 striking them, it didn't even mention it.

12 JUSTICE SCALIA: Their response --

13 JUSTICE STEVENS: But you -- you haven't really
14 answered my question yet.

15 MR. WAXMAN: Oh, I'm sorry.

16 JUSTICE STEVENS: Does any -- did any Texas
17 trial judge, to your knowledge, ever fall for this ploy,
18 ever grant a -- a challenge for cause based on answers to
19 the minimum punishment harangue?

20 MR. WAXMAN: I -- I would defer to Ms. Bunn
21 about that because I don't know about other cases, but --

22 JUSTICE STEVENS: I didn't see any in this case.

23 MR. WAXMAN: Well, what happened in this case
24 was there was an effort to rehabilitate. The trial judge
25 actually became quite energetic in trying to explain to

1 the juror that, well, it's 5 years and you're not saying
2 that you couldn't possibly consider 5 years. But -- and
3 that was true with respect to white jurors as well as
4 African American jurors.

5 JUSTICE SCALIA: The respondent's reply to this
6 -- this minimal punishment argument is that in fact the --
7 the two white prospective jurors who had -- who had
8 expressed antagonism towards the death penalty were
9 subjected to the same questioning, and that the seven out
10 of eight black prospective were seven who had expressed
11 antagonism to the death penalty. Now, is that not true?

12 MR. WAXMAN: I think that if I -- I believe that
13 with respect to minimum punishment, as opposed to the
14 graphic script, what the State is saying is last time we
15 said there were 10 whites and 10 blacks who expressed
16 hesitation. And this Court observed that, well, yes, but
17 only two of the whites got it. Now, they filed a brief
18 that says, well, the other eight were all either struck
19 for cause or by consent. Now, that's -- that fails for at
20 least two reasons.

21 One, they identified 10. In this Court and
22 below, we identified 19 jurors who absolutely expressed
23 hesitation about the death penalty, and they have still
24 not accounted for them. Number one.

25 Number two, with respect to the eight who they

1 have accounted for in their brief, the fact that at the
2 very end of voir dire, they were struck for cause, or
3 there was an agreement at the end of voir dire to remove
4 them hardly provides a reason not to give the minimum
5 punishment ploy to jurors who fit the categorization that
6 the State has described.

7 JUSTICE SCALIA: Well, we have to go through
8 each one of them and see if the degree of hostility
9 expressed by the white jurors was the same as the degree
10 of hostility expressed by the black jurors. And in fact,
11 the degree of hostility by the black jurors was quite
12 high.

13 MR. WAXMAN: Well --

14 JUSTICE SCALIA: One said I really don't believe
15 in it. I support it only in extreme cases, such as those
16 involving mass killings or mutilation. And another one --
17 another one said, well, right now maybe I do, but who
18 knows later?

19 MR. WAXMAN: I --

20 JUSTICE SCALIA: Now, if -- if there happens to
21 be a different attitude towards the death penalty among
22 the black jurors than there is among the white jurors, you
23 cannot fault the -- the attorneys for -- for striking more
24 of the black jurors.

25 MR. WAXMAN: Justice Scalia, in the context of

1 all of this other evidence, which is the context in which
2 you need to weigh it and determine whether we have
3 satisfied the stringent standard for review that applies,
4 I respectfully submit that if you go through the -- the
5 voir dire questioning of Mr. Fields and Mr. Warren and Mr.
6 Rand and the others that we've mentioned, and compare it,
7 even leaving aside all of the other evidence,
8 contemporaneous evidence, of race discrimination in the
9 jury selection in this case, I think you will have to come
10 to the conclusion that race was a but-for factor in these
11 cases.

12 In Mr. Fields -- we've -- we've mentioned him in
13 our -- we've described him at length in our brief. This
14 is a man whom -- I mean, forget the -- the State on its
15 questionnaire at the time, on page 14 of the joint
16 lodging, wrote, quote, no reservations against the death
17 penalty.

18 Mr. Rand, who we've compared and -- and your
19 concurring opinion, Justice Scalia, the last time it was
20 here said, well, yes, Rand and Mazza are very close, but
21 it's a high burden you have to -- you have to overcome
22 here. It's a burden we can overcome here not only because
23 of all of this other evidence, but because of what the
24 State wrote on the questionnaire when Mr. Rand was being
25 examined, page 30 of the joint lodging. This is the

1 State's notes. Quote: could be enforced depending on the
2 circumstances. Murder/robbery, type of offense. Think
3 proper for death penalty. Yes, I can serve. This is a --
4 this is a venireman who said that if he were Governor, he
5 would set the minimum punishment for murder at 99 years.

6 Mr. Fields was --

7 JUSTICE SCALIA: Well, now, wait. He also said
8 -- when asked whether he could vote to impose the death
9 penalty, he said, right now I say I can, but tomorrow I
10 might not.

11 MR. WAXMAN: He said --

12 JUSTICE SCALIA: Do you think that's a strong --

13 MR. WAXMAN: I'm -- I'm not sure whether that's
14 Rand or Warren, but I'm saying that if you compare Mr.
15 Rand who thought that the death penalty might be
16 applicable for all murder, who repeatedly -- in our reply
17 brief, we include the -- the recitation -- repeatedly said
18 over and over and over and over again that he would answer
19 the three questions yes, depending on the evidence,
20 without any regard for his view about the death penalty,
21 who testified that -- I'm not saying that this is somebody
22 whom, if this were a case in which there was nothing in
23 this -- we were just before this Court saying there's Rand
24 and Mazza or there's Rand and Hearn and that's enough to
25 satisfy our burden, I would be up here arguing it but it

1 would be a much more difficult argument. Here, those --
2 that comparison has to be taken in the context of not one,
3 not two, but six jurors who are similarly situated who
4 were treated to this questioning by people who engaged in
5 racially disparate shuffling, racially disparate
6 questioning --

7 JUSTICE GINSBURG: Well, that's the question.

8 JUSTICE SCALIA: We have to deal with each of
9 the six one by one, and -- and they have arguments with
10 respect to each of them. I don't care what Rand said.
11 Those things that you said sounded very good. But if he
12 finishes it off by saying, right now I say that, but
13 tomorrow I might not --

14 MR. WAXMAN: Well, I --

15 JUSTICE SCALIA: -- that doesn't strike me --
16 and that -- that's what respondent says Rand said, not --
17 not one of the other ones. And you have to go down each
18 of the other six, and they have a response for each one.

19 MR. WAXMAN: And if this --

20 JUSTICE SCALIA: I mean, and -- and, you know, a
21 buckshot attack on it has to be examined pellet by pellet.

22 MR. WAXMAN: Justice -- let me -- let me switch
23 your metaphor a little. The problem with the State's
24 approach to this case -- and it was the problem that -- of
25 the Fifth Circuit's analysis -- is it is pointillistic.

1 It is an analysis. It's like walking up close to a Seurat
2 painting and looking at each dot and saying, well, it's
3 red, but that might not necessarily be the handbag. Yes,
4 you have -- I mean, he had to paint with the dots, but as
5 a reviewing court, you need to step back and look at this
6 and ask yourself, with respect to, for example, Mr.
7 Fields, who said not only would he have no hesitation
8 about putting the death penalty in place, but he actually
9 testified that he thought that in capital cases, the State
10 was God's embodiment on earth.

11 JUSTICE KENNEDY: Suppose that you have 10 white
12 jurors and 10 black jurors. The 10 black jurors are all
13 questioned much more extensively by the State, and in each
14 of those cases, there is a plausible reason for excusing.
15 A relative was -- served time and so forth. Violation?

16 MR. WAXMAN: All in and of itself? I would say
17 definitely not. I -- I mean --

18 JUSTICE KENNEDY: So -- so then you admit that
19 you have to go one by one. I had thought you would --
20 would have said that if the black jurors are questioned in
21 a different way and more intensively, that alone suffices
22 even though the questioning in each case disclosed the
23 basis, plausible, non-racial basis --

24 MR. WAXMAN: No, I would give --

25 JUSTICE KENNEDY: -- for excusing them.

1 MR. WAXMAN: I would give you a different
2 answer, Justice Kennedy, if it's the jury shuffle because
3 there's no plausible explanation available on the evidence
4 in this case. If there is a plausible explanation for
5 disparate questioning, which there is not in the
6 statistics in this case, I wouldn't be arguing that that
7 in and of itself, leaving aside individual, you know,
8 side-by-side juror comparisons, would suffice.

9 But here, we have, in addition to the disparate
10 questioning that is not susceptible to a race-neutral
11 explanation -- we have things like the prosecutor's own
12 notations in the -- in the questionnaires.

13 JUSTICE GINSBURG: Mr. Waxman, you were dealing
14 with Fields, and the answer in Fields' case that the
15 prosecution gives is he had a strong feeling about
16 rehabilitation, and so he was -- he thought that everyone
17 could rehabilitated -- rehabilitated. So that shows he --
18 he wasn't like others who didn't entertain those doubts
19 about rehabilitation.

20 MR. WAXMAN: Yes, Justice -- Justice Ginsburg.
21 He -- he expressed an opinion that he thought that people
22 could be rehabilitated, not as strong as those opinions by
23 juror -- white Juror Hearn and white Juror Duke who sat.
24 But in Fields' case, he was absolutely unequivocal -- I'm
25 -- I'm referring the Court to page 185 of the joint

1 appendix -- absolutely unequivocal that the ability or
2 propensity for rehabilitation would not affect his
3 willingness to -- to put in the death penalty. I believe
4 in the dissenting and concurring opinions in this case
5 last time with respect to Mr. Fields, it was pointed out
6 that he was a supporter of the death penalty who could put
7 in the death penalty.

8 And what's interesting about Fields is if you
9 look at the transcript pages where the prosecutor
10 justifies the strike, on page 197 of the joint appendix,
11 the prosecutor says, well, he was -- he -- he -- I -- he
12 -- he said something about rehabilitation, and it goes on.
13 And then two pages later -- they have a discussion about
14 something -- a discussion about which questionnaires will
15 or won't go into evidence. Two pages later, Mr. Nelson
16 comes in and says, oh, yes, and he also had a brother who
17 had had some involvement with law enforcement. Well, to
18 say that that's an afterthought is really saying
19 something. He wasn't questioned about it, as -- as
20 neither were -- by the State, as neither were any of the
21 four white jurors who sat who had family members who had
22 been arrested or prosecuted. They didn't even ask these
23 questions.

24 May I reserve the balance of my --

25 JUSTICE O'CONNOR: Was there any evidence that

1 the jury cards in this -- in the actual trial were marked
2 or noted on the basis of race?

3 MR. WAXMAN: Oh, absolutely.

4 JUSTICE O'CONNOR: Where do we find that
5 evidence?

6 MR. WAXMAN: The -- the juror cards are in the
7 joint lodging beginning on page 82, and every single card
8 lists the gender and race, even the cards as to jurors
9 that they never questioned. So we know that these were
10 notations that were placed on the cards by the prosecutors
11 at the time the venires were called.

12 And the interesting thing about these is it's
13 not just race and gender, it's were they fat, did they
14 have a beard, did they have a mustache. If you map up
15 what's noted on these cards with the Sparling training
16 manual that said don't take minorities, don't take Jews,
17 don't take women, don't take fat people -- people who have
18 mustaches and beards don't make good jurors. It's --
19 these prosecutors were not only trained by that manual,
20 they learned their lesson very well.

21 May --

22 JUSTICE SCALIA: All of those things are okay,
23 right, except the race one.

24 MR. WAXMAN: Well, I --

25 JUSTICE SCALIA: I mean, maybe their right about

1 beards and mustaches.

2 MR. WAXMAN: We know that --

3 JUSTICE SCALIA: I don't know. If they're
4 right, good for them. Right? You -- you -- they ought to
5 strike them.

6 MR. WAXMAN: I -- we're not here -- if this were
7 gender or race, this Court has said that can't be the but-
8 for reason. Mustaches, overweight, you know, go with God.

9 May I -- may I reserve the balance of my time?

10 JUSTICE STEVENS: Yes, by all means.

11 MR. WAXMAN: Thank you.

12 JUSTICE STEVENS: Ms. Bunn.

13 ORAL ARGUMENT OF GENA BUNN

14 ON BEHALF OF THE RESPONDENT

15 MS. BUNN: Justice Stevens, and may it please
16 the Court:

17 The big picture. The majority of African
18 Americans summoned for jury duty in this case were either
19 opposed to the death penalty generally or unwilling to
20 impose it, while the majority of white jurors had no
21 qualms about the death penalty. Striking prospective
22 jurors based on their case-related views which, after the
23 fact, correlate with race is not unconstitutional.

24 Essentially, though Miller-El has presented this
25 case as one of disparate treatment, it is actually one of

1 disparate impact. I will discuss first --

2 JUSTICE KENNEDY: Would -- would the statement
3 that you gave -- let's assume there was a -- a working
4 premise that blacks were more -- were less inclined to
5 impose the death penalty. Would that alone justify more
6 intensive questioning of every black juror?

7 MS. BUNN: No, Your Honor, it would not. And
8 the record in this case actually does not support that
9 that -- does not support a proposition that black jurors
10 were questioned differently. Most significantly, the
11 minimum -- the questioning on the graphic script. Of the
12 six challenged jurors in this case, only two received the
13 graphic -- graphic script at the outset of their voir
14 dire, Carrol Boggess and -- and Wayman Kennedy, both of
15 whom had answered the questions in their juror
16 questionnaire indicating ambiguity regarding their views
17 on the death penalty regarding their support for the death
18 penalty. This fact --

19 JUSTICE BREYER: Now -- now, as I understand it,
20 this case was here before. We all read this and we went
21 through it, and as a result of that, I -- if I read the
22 opinion -- not the dissent, but the majority opinion --
23 and it might be in my interest if people followed dissents
24 more, but I think the law is we follow the majority
25 opinion.

1 So when I read the majority opinion, I read,
2 number one, there was history in this county, at least 7
3 years earlier though, where they actually had a booklet
4 which said let's keep all the African Americans out,
5 here's how you do it.

6 Then you had jury shuffling, which were two
7 instances. In one of them, there are like 40 people. In
8 my mind, you know, we have rows. In row 1 there are four
9 black jurors and six white; row 2, three black and seven
10 white; row 3, two black and in the last row one black, and
11 the prosecution says, hey, let's shuffle it. All right?
12 And the other time he did it, the only other time -- it
13 wasn't quite that bad -- the same idea.

14 Then the third thing that comes up is you find
15 instances here -- not everyone, absolutely right -- but
16 instances where black people who seemed really for the
17 death penalty, say, like Mr. Fields manages to get knocked
18 off, but Mrs. Mazza who seems quite uncertain is kept on.

19 And then we have this disparate questioning that
20 you're about to mention where it just turns out that
21 almost every black is given this really -- you know, bring
22 them in a gurney, put -- put -- you know, real graphic
23 description of the death penalty, and white people who
24 also expressed hesitation aren't. Okay?

25 So on the basis of that, the majority writes

1 there is, indeed, a strong suspicion here that this was
2 discrimination. So I want to ask you -- and if I were to
3 write something like that -- I didn't write the words, but
4 I would mean, well, I think that's what it is unless
5 there's something later on that comes out to the contrary.
6 So I'm asking you what was to the contrary. What came out
7 in this Fifth Circuit that we didn't have in front of us
8 the last time?

9 MS. BUNN: Your Honor, the first time before
10 this Court, the issue was whether, based on a threshold
11 examination of the record --

12 JUSTICE BREYER: I know that was the issue, but
13 I'm saying if I read the opinion to say -- now, maybe
14 you'll tell me I shouldn't. We should just go back and
15 redo what we did. But I'm reading the opinion to say,
16 well, unless something changes here, this is bad. It's
17 discriminatory. Now, you can tell me, one, I'm wrong to
18 read the opinion that way. I got that argument. But I
19 want to be sure that that's what's in front of me. So I
20 want to know is there something different in the Fifth
21 Circuit that wasn't here the first time.

22 MS. BUNN: Your Honor, I believe the most -- the
23 most important difference in the review of this Court the
24 last time and the review of this -- of the Court this time
25 is that the Court did take a big-picture look at all of

1 the pieces of evidence, but at this point, as the court of
2 appeals did and as this -- as this Court must do now, it
3 must go, as Justice Scalia mentioned, juror by juror, the
4 jurors who were challenged. Miller-El --

5 JUSTICE SCALIA: We only speak to the issues
6 before us, don't we? And the issue before us last time
7 was not the issue before us here. It was simply whether
8 there was enough evidence to require the issuance of a
9 COA. Isn't that right?

10 MS. BUNN: That is correct.

11 JUSTICE BREYER: Right. That's why I asked.

12 JUSTICE SCALIA: And that's a good deal
13 different. Whatever the majority might have said about
14 other issues, it certainly was not binding on the court of
15 appeals, was it?

16 MS. BUNN: No, Your Honor.

17 JUSTICE STEVENS: I hate to say this --

18 JUSTICE BREYER: So that must be a different
19 question --

20 JUSTICE STEVENS: -- to my colleagues, but I'm
21 very much interested in hearing what Ms. Bunn has to say.

22 JUSTICE BREYER: -- because that wasn't the one
23 I asked. The one I wanted answered was the question of I
24 understand that point, which we could say it was
25 definitely not definite the last time. I'm asking you --

1 it's a serious question -- as whether there was something
2 new or different that came up when the Fifth Circuit wrote
3 this. Now, I gathered from your answer, it might be yes,
4 and if the answer is yes, I want you to say what it is
5 because I'm interested.

6 MS. BUNN: Yes, Your Honor, there was additional
7 analysis, particularly of the six jurors Miller-El claims
8 were discriminated against, which this Court did not
9 review the first -- in its first opinion specifically.
10 And a review of Miller-El's purposeful discrimination
11 claim must focus on these six jurors.

12 And given the -- the views expressed by these
13 six veniremen, it is no surprise that prosecutors struck
14 them. Each venire member peremptorily struck by the State
15 had voiced views unfavorable to the State but were not
16 subject to a challenge for cause. These reasons are race-
17 neutral, case-related, and supported by the record, in
18 fact, supported by the very words that the jurors uttered.

19 Carrol Boggess indicated that her beliefs -- on
20 the questionnaire indicated her beliefs would impair --
21 would impair her ability to impose the death penalty as a
22 juror. She referred to her -- an execution as a murder
23 during her voir dire and other comments evincing hesitance
24 regarding her ability to impose the death penalty.

25 JUSTICE STEVENS: May I ask you this? There are

1 two questions just generally. One, I'm curious about the
2 answer to my question to -- to Mr. Waxman. Did the
3 minimum punishment ploy ever work? Did it ever succeed in
4 getting a challenge for cause granted?

5 MS. BUNN: Your Honor, there are other cases
6 that I'm aware of in Texas where the State did challenge
7 jurors on this basis. Whether there was any questioning
8 -- any difference in questioning, I don't know. It's not
9 apparent from the records.

10 JUSTICE STEVENS: But have -- and the challenges
11 were granted?

12 MS. BUNN: Yes, Your Honor.

13 JUSTICE STEVENS: Of course, none of them were
14 granted in this case. Is that right?

15 MS. BUNN: That's correct.

16 JUSTICE STEVENS: So it -- it was true that this
17 was -- was a ploy adopted for the purpose of trying to
18 make it unnecessary to use a -- a peremptory challenge.

19 MS. BUNN: Yes, Your Honor. Yes, Your Honor,
20 that is right.

21 JUSTICE STEVENS: And do you defend that
22 practice?

23 MS. BUNN: Yes, if it is a legitimate tactic,
24 recognized -- as an attorney, if there is a -- some means
25 that is available to use so that you do not have to use a

1 peremptory strike --

2 JUSTICE STEVENS: If you -- if you can get the
3 venire person to make a mistake in his answer, then you --
4 you get -- get him off easy.

5 MS. BUNN: That's what -- that's what voir dire
6 is all about, and the defense counsel did it in many
7 occasions --

8 JUSTICE KENNEDY: And suppose -- suppose you
9 have a system in which that attempt to find cause is
10 applied much more rigorously to black prospective jurors
11 than to white prospective jurors.

12 MS. BUNN: If it's not -- the record shows that
13 there's no difference in the views expressed by the
14 jurors, yes. In this case that --

15 JUSTICE KENNEDY: No. The -- the white jurors
16 don't express the views at all because they're not
17 questioned intensively, so you don't know if there's cause
18 for them or not. But the black jurors are questioned
19 intensively, and you find cause or -- or a -- a race-
20 neutral reason for the dismissal. Is there a Batson
21 violation in -- in that instance?

22 MS. BUNN: No, Your Honor, not a Batson
23 violation. Now, whether it's evidence of -- of --

24 JUSTICE KENNEDY: So -- so you say that in any
25 case you can question black jurors more intensively than

1 white jurors and still succeed in excusing them if the
2 result of that voir dire shows some race-neutral basis.

3 MS. BUNN: Your Honor, if the questioning itself
4 results in the views that are the basis of the strike,
5 that would present a problem. That is not the case here,
6 however, where the -- the disparate questioning on minimum
7 sentencing, for instance, was based on the views that were
8 expressed.

9 JUSTICE KENNEDY: Suppose -- suppose you have a
10 manual of -- from the district attorney's office that says
11 all black jurors shall be questioned more intensively than
12 white jurors.

13 MS. BUNN: That would certainly be evidence that
14 black jurors and white jurors were treated differently.

15 JUSTICE SCALIA: You're saying that that is not
16 what happened here.

17 MS. BUNN: Yes.

18 JUSTICE SCALIA: It was on the basis of the
19 questionnaires expressing hostility to the death penalty
20 that more intensive questioning was given to some people
21 than to others, and that the mere fact that a larger
22 number of those people was black is not a violation.

23 MS. BUNN: Yes, Your Honor, that is correct.

24 JUSTICE SCALIA: So the hypothetical, assuming
25 that you -- you just have blacks and whites with no

1 difference in -- in what they -- in what they had said on
2 the questionnaire, is a hypothetical that you say does not
3 exist in this case.

4 MS. BUNN: Yes.

5 JUSTICE STEVENS: Yes, but you don't know what
6 the questionnaire showed as to most of the white venire
7 persons, do you?

8 MS. BUNN: No, we don't, Your Honor.

9 JUSTICE STEVENS: And how many white venire
10 persons were there?

11 MS. BUNN: 48.

12 JUSTICE STEVENS: 48. And how many were given
13 this questioning? Two?

14 MS. BUNN: On the graphic script?

15 JUSTICE STEVENS: Yes.

16 MS. BUNN: Two -- three.

17 JUSTICE STEVENS: And so are we to assume that
18 all 46 of the other white venire persons were as tough on
19 the death penalty as you'd like everybody to be?

20 MS. BUNN: No, Your Honor.

21 JUSTICE STEVENS: We just don't know about those
22 other 46, do we?

23 MS. BUNN: We do not know. We do not --

24 JUSTICE STEVENS: But is it not a reasonable
25 inference that some of them might have expressed doubt

1 about the death penalty?

2 MS. BUNN: That is -- we do not know. There --
3 even though we do not know --

4 JUSTICE BREYER: Well, if you don't know -- if
5 you don't know, you -- there's an excellent way to know.
6 Somebody says, you know, Mr. Prosecutor, you gave this
7 terribly graphic script to all the black people and you
8 really didn't give it to hardly any of the white people.
9 Now, it's also possible -- possible -- that the reason he
10 didn't was because from the answer to their
11 questionnaires, which we've not seen, you didn't need to.
12 That's possible. But if that were the case, wouldn't he
13 have said to the judge, Judge, that's why I did it. I
14 didn't ask them because I read the questionnaires.
15 Wouldn't that be what you would do or any prosecutor would
16 do if that were the reason?

17 MS. BUNN: Yes, Your Honor, I would.

18 JUSTICE BREYER: And did the prosecutor ever do
19 that here?

20 MS. BUNN: No, but significantly in this case,
21 the arguments regarding disparate questioning were never
22 raised until Federal habeas corpus proceedings. They were
23 not raised at trial when the jury questionnaires still
24 existed.

25 JUSTICE BREYER: Did the prosecutor not -- was

1 he there?

2 MS. BUNN: No, Your Honor. He was not --

3 JUSTICE BREYER: No. And did -- was anyone

4 there who had ever talked to the prosecutors?

5 MS. BUNN: The prosecutors were contacted during

6 that period, but the questionnaires --

7 JUSTICE BREYER: All right. So could then --

8 MS. BUNN: -- no longer existed at that point.

9 JUSTICE BREYER: But couldn't you have asked the

10 prosecutors if that was the reason?

11 MS. BUNN: 20 -- 15 years after a case is

12 tried --

13 JUSTICE BREYER: I mean, what are we supposed to

14 do? I mean, what you've done is say -- of course, I could

15 think of reasons that could have been their reason, but

16 unless there's some reason for thinking that was their

17 reason --

18 MS. BUNN: Well, Your Honor, in this case, the

19 -- the inmate Miller-El has the burden. He had the burden

20 in the trial court. He had the burden to prove purposeful

21 discrimination, and he could have put -- he did put the

22 questionnaires of the 10 challenged jurors in the record.

23 He did not --

24 JUSTICE KENNEDY: Well, on -- on that point,

25 this is not exactly like McDonnell Douglas, Burdine where

1 you have some prima facie case, the person was equally
2 qualified, but was of a different gender than the one that
3 got the job, and then the -- you go back to square one.

4 Here, the prima facie case is immensely powerful
5 because of the culture of discrimination in the manuals
6 and so forth, and that -- that, it seems to me, stays in
7 this case.

8 MS. BUNN: Your Honor, this evidence, however
9 compelling a picture it draws of past injustice, simply
10 cannot trump the State court's finding of no purposeful
11 discrimination. It does not address --

12 JUSTICE SOUTER: Well, don't we at some point
13 have to have some reason to believe that the evidence of
14 past practices become irrelevant? And if we -- if that is
15 so, do we have any such evidence here?

16 MS. BUNN: There -- there was evidence in the
17 Swain hearing, and that -- in fact, the cross examination
18 by the prosecutors did indicate that practices that were
19 in the past had been -- had been vitiated, at least closer
20 to the time of trial. But regardless of that --

21 JUSTICE SOUTER: These are the same two
22 prosecutors who in other cases had been found, in effect,
23 guilty of -- of racial discrimination and the same two
24 prosecutors who were calling for the shuffle in these
25 cases. Is it plausible to think that there had been this

1 change of heart?

2 MS. BUNN: Even assuming the evidence, the
3 historical evidence -- assuming its relevance, as the
4 Fifth Circuit did --

5 JUSTICE SOUTER: Well, I mean, I -- I am
6 assuming it is relevant, and I am asking the question, is
7 there a reasonable basis to think that these particular
8 individuals, engaging in the practice that they
9 demonstrably engaged in, had had a change in heart in this
10 case?

11 MS. BUNN: Yes, Your Honor. The record in this
12 case indicates that -- for instance, with the use of
13 graphic script questioning, the -- of the six -- again, of
14 the six challenged jurors, four did not receive the
15 graphic script at the outset of voir dire.

16 JUSTICE SOUTER: Is that why they engaged in the
17 shuffle twice --

18 MS. BUNN: Your Honor --

19 JUSTICE SOUTER: -- on -- on a record that shows
20 there were black jurors down front each time they engaged
21 in it?

22 MS. BUNN: The record shows that of 5 weeks of
23 voir dire, the State requested shuffles three times. Two
24 of those times, the defense counsel put on the record that
25 there were a greater number of African American jurors in

1 the front of the panel. They --

2 JUSTICE SOUTER: And -- and that evidence was
3 not refuted. It was not denied, as I understand it.

4 MS. BUNN: Your Honor, there was no response
5 from the prosecutors. There was no objection made, no
6 specific objection made as to -- as to the State's
7 exercise of a jury shuffle. But in this case to ask this
8 -- what -- what Miller-El is asking this Court is to
9 assume that the only discernible trait that could have
10 been the basis for the State's exercise of a jury shuffle
11 is race, and that is not -- that is not the case.

12 JUSTICE SOUTER: The -- I -- I don't think
13 that's his argument at all. He is not arguing that there
14 might not be other bases for making challenges or making
15 peremptory strikes. What he is saying is those challenges
16 exist for lots and lots of jurors. And what in fact there
17 is is very strong circumstantial evidence that what tipped
18 the prosecutors to make the peremptory challenges here --
19 what he was referring to earlier in this argument as the
20 but-for cause was racial. He's not saying nothing else
21 could have been involved. He was saying race tipped it.
22 And it's the circumstantial evidence, among other things,
23 that indicates that race does.

24 And that's the reason for my question. Is there
25 some reason to believe that there had been a change of

1 heart on the issue of race so that his argument is
2 unsound?

3 MS. BUNN: Your Honor, again, Miller-El's claim
4 of purposeful discrimination must focus on these six
5 jurors, and in answer to your question, a review of these
6 six jurors does show that these strikes were not based on
7 race. This was not the tipping --

8 JUSTICE BREYER: You think they're based, for
9 example, on capital punishment. But now, let me give you
10 two of them, and this is why -- this is actually why I get
11 somewhat concerned about this.

12 Here is the answer of the white woman who served
13 on the jury about capital punishment. Could you put
14 Miller-El to death? Mrs. Mazza: It's difficult. I've
15 had 2 days to think about it, and given my religious
16 upbringing, et cetera, going on for a few sentences, I
17 think I could. She serves on the jury. Okay?

18 Here's Mr. Fields who is black and whom they got
19 off. What I think, according to the Old Testament, people
20 were killed if they violated His law. In its extended
21 service, the State represents Him. I feel the State is
22 God's extended person. In other words, the State
23 represents God in today's time. Therefore, if the State
24 exacts death, that's what it should be. Okay?

25 That's the man they feel has the qualm, and the

1 woman I told you who was white they feel has no qualm.

2 Now, I look at that, and I say, you know, I
3 mean, my goodness, it's pretty hard to see how you get
4 yourself in that frame of mind.

5 MS. BUNN: Your Honor, the -- that was not the
6 prosecutor's argument at trial and it's -- it is not our
7 position now that --

8 JUSTICE BREYER: No. I know. They then said
9 that oh, you see, Mr. Fields was -- is it a woman or a
10 man? I'm not sure. Yes, he's a man I think. He -- he's
11 kept off, the black man, because of his views on
12 rehabilitation. So I looked up what those views were, and
13 that consists of his saying -- my -- my interpretation --
14 well, I think any person, if he really believes in God,
15 really believes in God, could be rehabilitated. At which
16 point the prosecutor says to him, well, suppose you came
17 to the conclusion that Miller-El really was touched by
18 God, could you put him to death? Answer: Yes. Why?
19 Because, well, it seems to me my job here is to follow the
20 law.

21 That's the man whom they think they are -- they
22 are kicking off because of his views of possibly not
23 applying the death penalty, and the other woman, who is
24 white, they keep on. Now, I think that's the whole story
25 there. There was also the brother who was a drug -- who

1 was the drug -- you know, he had had drug convictions, but
2 that's scarcely mentioned. So -- so I look at those two
3 people and I think, gee, put that in context. My
4 goodness.

5 What -- what's your response to that?

6 MS. BUNN: Your Honor, as to Juror Billy Jean
7 Fields, he did not express qualms about the death penalty
8 in general, but he did state that it was his belief that
9 no one -- no one -- no matter their background or what
10 they've done, is beyond rehabilitation. Everyone can be
11 rehabilitated. And this was a view regarding
12 rehabilitation that no one, white or black, had expressed.
13 It was a unique view, and in this case where jurors are
14 asked to -- to -- the question, is this person going to be
15 a continuing threat to society, is -- is something that's
16 going to go into their punishment inquiry. And if this
17 person is one who the prosecutor believed could tend -- if
18 there's a repentant criminal defendant on the stand who
19 testifies, that they would tend to believe that person and
20 answer the question no.

21 And -- and again, this was not the only basis
22 for the State's strike as well. The fact that his brother
23 had been prosecuted in Dallas County numerous times, the
24 same prosecuting authority, contemporaneous with the
25 trial, numerous occasions, had served time, and contrary

1 to Miller-El's assertions, the State did question Mr.
2 Fields on this issue during voir dire, and it was a basis
3 for the strike. There --

4 JUSTICE GINSBURG: Ms. Bunn, before you finish,
5 there -- there are two pieces of this I hope you can give
6 me an answer to. The race-coding. Is there any neutral
7 reason for that? And when was that stopped, if it was?

8 MS. BUNN: I -- I don't -- I don't have any
9 information. There's no information on -- in the record
10 about exercising it in other cases, and I just -- I just
11 don't know.

12 But the first part of the question, there could
13 -- as Mr. Waxman mentioned, there -- there were other
14 visual cues noted on the cards. Attorneys, especially --

15 JUSTICE STEVENS: Is it not a fair inference
16 that each of the cues noted on the cards was something
17 that the prosecutors thought relevant to whether or not to
18 challenge the juror? And if so, is it not -- does -- is
19 that not uncontradicted evidence that the race of the
20 venire person was a factor in the decision?

21 MS. BUNN: Not necessarily. I mean, there were
22 other -- there was other --

23 JUSTICE STEVENS: Well, why else would it be
24 noted?

25 MS. BUNN: There was -- just to familiarize an

1 attorney getting ready for voir dire of an extensive
2 number of people --

3 JUSTICE KENNEDY: Is -- is there any --

4 JUSTICE SCALIA: Maybe the prosecutors didn't
5 want to come up with an all-white jury for fear it would
6 be challenged.

7 MS. BUNN: That's certainly --

8 JUSTICE STEVENS: That may be, but is it not --
9 is it not clear that this is one of the factors that was
10 used to decide whether or not to exercise a challenge,
11 just as the beard and the other things that are mentioned
12 in the -- in the manual were?

13 MS. BUNN: No, Your Honor. The fact that it was
14 noted on the race -- on the -- on the juror card does --
15 does not necessarily indicate that. Again, it could be a
16 cue for a -- a litigant preparing for voir dire.

17 JUSTICE KENNEDY: Well, were the -- were the
18 cues on the card similar to the instructions in the
19 manual?

20 MS. BUNN: There were some that could -- that
21 would correlate, but there were others that aren't noted
22 on the juror cards --

23 JUSTICE KENNEDY: Can you quantify the
24 correlation or lack of correlation for me?

25 MS. BUNN: The -- for instance, occupations were

1 -- or addresses -- perhaps not occupations, but I know
2 addresses were -- were noted. There could have been other
3 things at that point that were not noted. There was a lot
4 -- information available at that point, whether visual or
5 from the juror information cards.

6 JUSTICE GINSBURG: I had asked you if they were
7 still race- and gender-coded. You hadn't gotten to that
8 part of the question. These cards were race-coded and for
9 other things too. Right now in the State, do the
10 prosecutors code cards -- cards for race and gender?

11 MS. BUNN: I do not know. I do not --

12 JUSTICE GINSBURG: The other question I had, are
13 these two prosecutors the same ones who were involved in
14 other cases where it was determined that they had used
15 tactics that violated Batson? Were those cases
16 contemporaneous with Miller-El's or were they earlier in
17 time?

18 MS. BUNN: The record indicates that Prosecutor
19 Macaluso was involved in jury selection in the Chambers
20 case, and that case was tried months -- I believe it was
21 late 1985 when Chambers was tried.

22 JUSTICE KENNEDY: Wasn't that 2 months?

23 MS. BUNN: 2 months? This was March, so it
24 would have been probably 4 or 5 months, within a year
25 certainly.

1 JUSTICE SCALIA: Is it -- is it unlawful to take
2 sex into account in jury selection?

3 MS. BUNN: Yes. Yes, Your Honor, it is. That's
4 certainly not alleged in this case. The jury actually
5 consisted of seven women.

6 But again, to -- the -- the race-coding issue --
7 as far as whether it's exercised now, I mean, I wouldn't
8 be particularly surprised if it were. A conscientious
9 litigant -- it's really necessary to keep track of the
10 race of prospective jurors, as Justice Scalia noted, to be
11 certain that you don't run afoul of Batson. But --

12 JUSTICE SOUTER: Is -- is that true with respect
13 to weight and mustaches and things like that?

14 MS. BUNN: That -- that doesn't --

15 JUSTICE SOUTER: They were -- they were making
16 notations of things like that, as I understand it, and
17 they didn't have to worry about Batson there. But there
18 does seem to be a correlation with the manual.

19 JUSTICE STEVENS: And Batson hadn't been decided
20 yet.

21 MS. BUNN: Yes, that's true. I was referring to
22 Justice Ginsburg's question about the -- the practice,
23 whether it continues.

24 But again, regarding its use in this case, I
25 would -- I would say that it -- it's not -- does not

1 necessarily lead to the conclusion that it was noted
2 basically to treat African American venire members
3 differently because the record actually --

4 JUSTICE SOUTER: But I -- I don't -- I mean, I'd
5 just like to go back to my question. I don't know why
6 else? It's true if -- if all they noted, if they had been
7 prescient and had said, you know, Swain is going to give
8 way to Batson and we're going to note Batson issues, you'd
9 have an argument. But they were noting a lot of non-
10 Batson issues too, and the one common characteristic of
11 the Batson issues and the non-Batson issues were they were
12 all correlated to a manual that says keep these people off
13 the jury. And -- and isn't that a sound train of
14 reasoning that that's what they were trying to do?

15 MS. BUNN: Your Honor, the -- the notations,
16 though, correlate as well to simply visual cues that a
17 litigant will use just simply to familiarize himself with
18 the panel.

19 JUSTICE SOUTER: The manual had said there are
20 certain visual cues that indicate jurors you don't want on
21 the jury. You don't want black jurors. You don't want
22 women jurors. You don't want Jewish jurors. You don't
23 want fat ones. You don't want bearded ones. And these
24 are the things that they were noting. Isn't the
25 reasonable inference that that's what they were noting

1 them for?

2 MS. BUNN: Your Honor, there are other
3 explainable reasons, there are other plausible reasons for
4 noting those things. But even that aside, again, we must
5 look at these six jurors and they all expressed views
6 unfavorable to the State. And Miller-El has failed to
7 identify a similarly situated white juror.

8 JUSTICE GINSBURG: What about the Fifth Circuit
9 said that comparing Rand's testimony -- that that was in
10 line with Mazza's. The Fifth Circuit seems to recognize
11 that those two were closely comparable.

12 MS. BUNN: Justice Ginsburg, they recognized, as
13 Justice Scalia had in his concurring opinion, that that
14 was basically as close as it got. But at most, Mazza
15 acknowledged that the decision whether to impose a death
16 sentence would be difficult, not an easy one, kind of
17 hard, but she simultaneously stated that it was a decision
18 that she believed that she could make. She never
19 questioned her ability to assess a death sentence in an
20 appropriate case. She merely acknowledged that it was a
21 decision that she would not take lightly. She also had
22 served on another criminal jury in the last couple of
23 years, a jury which had returned a guilty verdict.

24 In contrast, Rand explicitly questioned his
25 ability to assess a death sentence in any case. When

1 asked whether he could impose the death penalty, he told
2 prosecutors right now I say I can, but tomorrow I might
3 not. He declined to describe himself as someone who
4 believes in the death penalty and can serve as a jury --
5 juror and assess the death penalty if warranted, stating
6 that he was probably in between the first two categories
7 described by the prosecutor.

8 Notably, Mr. Waxman referred to the prosecutors'
9 notes on the questionnaires. What he didn't mention was
10 also noted on the -- by the State at -- at the joint
11 lodging, page 30, is that Juror Rand had referred to the
12 death penalty as a touchy subject and that he had
13 described himself as a person falling somewhere in between
14 the two categories described by the prosecutor, the first
15 being someone who believes in the death penalty and can
16 assess it, the second being someone who believes in the
17 death penalty generally but cannot personally assess it as
18 a juror. So the State did take note of the -- of the
19 expressions of ambivalence by Rand during his voir dire.

20 Juror Mazza, again, never expressed this level
21 of ambivalence. These are not similarly situated jurors.

22 And the same is true of Miller-El's attempted
23 comparison of Rand and -- and Juror Sandra Hearn. She
24 expressed hesitation on assessing the death penalty in a
25 very particular circumstance, the -- a first offense, and

1 certainly this is not the case here. On the other hand,
2 Rand had questioned his ability to assess a death penalty
3 in any case and, against Hearn's State-friendly views, led
4 to a defense challenge that was overruled. And the fact
5 that the defense vehemently objected to her on direct
6 appeal is further evidence that she's not similarly
7 situated.

8 Under Batson, Miller-El has the ultimate burden
9 of proving purposeful discrimination. He has failed to
10 satisfy that burden, and the State trial judge found that
11 prosecutors in this case did not act with a discriminatory
12 purpose. As this Court acknowledged in its earlier
13 opinion, Miller-El is not entitled to habeas relief unless
14 he can -- he can show that the State court's rejection of
15 his Batson claim was objectively unreasonable. He must
16 produce clear and convincing evidence and he has failed to
17 do that.

18 JUSTICE STEVENS: Thank you, Ms. -- Ms. Bunn.
19 Mr. Waxman, you have about 3 minutes left.

20 REBUTTAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE PETITIONER

22 MR. WAXMAN: I have just three points.

23 The Fifth Circuit had precisely the same record
24 before it that this Court had and the State submitted very
25 nearly precisely the same brief that it presented to the

1 Fifth Circuit the time before.

2 Disparate questioning on the minimum punishment
3 ploy was objected to by the defense during the voir dire
4 and it was acknowledged. If you look at the Batson
5 argument, it's either Mr. Macaluso or Mr. Nelson said some
6 of the jurors were questioned disparately, but -- and they
7 gave the explanation that it had to do with views on the
8 death penalty. So it was before the State courts.

9 Now, on the graphic script, which is the
10 disparate questioning that Ms. Bunn has focused the
11 Court's attention on, the State now says, okay, we can't
12 speculate about what we don't know about the
13 questionnaires. Let's just look at the questionnaires
14 that we do know about. Justice Stevens, it is -- you are
15 quite right that that tells you nothing about the dozens
16 of other white jurors whose questionnaires we don't have,
17 but we don't need to indulge in that speculation in this
18 case because what we know from the questionnaire answers
19 that we have is that every black who expressed anything
20 that could be called hesitation on their juror
21 questionnaire, including just not filling in either
22 question -- answering question 56 or 58, got it. Five
23 whites who expressed hesitation did not. That is Juror
24 Mazza, Juror Hearn, Juror Duke, Ms. Girard, who testified
25 that she didn't -- who acknowledged in her voir dire that

1 she hadn't filled out one of those questions which got
2 similarly situated African American jurors the graphic
3 script, and Juror Whaley who -- or Venireman Whaley who
4 testified that her questionnaire expressed great
5 hesitation about the death penalty.

6 And what we also know is that the three jurors
7 who got the graphic script, Troy Woods, the black juror;
8 Mr. Gutierrez, the Hispanic juror; and Marie Sztybel, the
9 only Jewish juror.

10 If the Court has no further questions.

11 JUSTICE STEVENS: The case is submitted.

12 (Whereupon, at 11:58 a.m., the case in the
13 above-entitled matter was submitted.)
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